Commonwealth of Massachusetts

Department of Telecommunications and Energy

Application of the Cities of Haverhill And)

Easthampton for Approval of their Municipal) DTE 99-93

Aggregation Plans Pursuant to General Laws,) DTE 99-103

Chapter 164, Section 134(a))

Haverhill and Easthampton

Motion For Protective Treatment

The Cities request confidential treatment of the draft electric supply contracts associated with retail supply service to their municipal aggregations.

Introduction

The two cities issued a single procurement document to potential suppliers on November 5, 1999. Based on the market feedback from that procurement, the Cities issued an addendum in December. The DTE conducted public hearings in both cities on both plans in December. We received responsive bids in January that yield savings below the standard offer. We are currently in final negotiations with two bidders.

Our procurement plan from the beginning has been based on negotiating contract language that is based on indicative pricing. Our plan has been to submit draft contracts to the DTE for review and to request "final prices" and make the final contractor selections the day prior to the DTE hearing to approve the "final fully priced contracts". As you know, in order to make this review process work, we need to file "draft" contracts that are still under negotiation, for DTE review, two to three weeks in advance of filing the "final contracts" for approval in that final hearing.

In order to file these draft contracts for DTE review, we need to request confidential treatment of these draft contracts, for the two to three week period that they remain drafts.

DTE Review of Municipal Aggregations

Before discussing the standards regarding confidential treatment directly, I would like to address the overall DTE review standard for municipal aggregations.

By removing the Municipal Aggregator from the definition of Aggregator in the Restructuring Act, the legislature contemplated a reduced level of regulatory oversight for municipal aggregations. DTE regulations have continued with this approach. 220 CMR 11.05, for example, does not apply to municipal aggregators.

MGL c 164 s 134(a) defines the standard for reviewing municipal aggregations. A municipal aggregation plan, which contains the minimum plan elements required by that section, and which has been developed in consultation with DOER and then approved by City Council vote, should be approved " . . . if the applicant can demonstrate that the price for energy under the aggregation plan will be lower than the standard offer . . ." It is worth emphasizing two of the elements outlined in this language, because they justify the relatively narrow "savings below standard offer" review standard:

1. First, the plans must be developed from the beginning with active consultation and involvement of DOER (in the case at hand we involved the DTE staff in that consultation).
2. Second, the fully developed plans (that reflect this state input) must be submitted to the local City Council's for review and approval, before submitting them to the DTE for formal approval.

We completed the consultation phase with the state in September, secured City Council approvals in September and October, filed these plans with the DTE in November and then issued our procurement document. We are now approaching the end of this process. The process for the past several months has been informal. The process, to date, has given appropriate recognition to the autonomy intended by the legislature for city council approved programs. (It is worth noting that chapter 164 gives these same City Councils the authority to approve the formation of a municipal utility. If the Cities so chose, they could use that municipal utility authority to enter the generation supply business and bypass this more informal DTE reviewed aggregation process entirely.)

The final step in this municipal aggregation process is to submit the retail contracts that will be incorporated into the aggregation plans, to DTE. The purpose of this to substantiate that these "fully priced plans" achieve savings below the standard offer.. It is a mistake, in our view, to assume at this point, that the same formal procedures and strict review standards applicable to investor owned utilities should be applied to municipal aggregations. The Cities of Haverhill and Easthampton are not investor owned utilities.

The Restructuring Act does not envision utility type regulation of municipalities that develop municipal aggregations.

We appreciate the efforts of the Department, to date, to work cooperatively with the cities. In particular we appreciate the willingness of staff to review and comment on various drafts of our Aggregation Plans and the Haverhill Energy Plan. We also appreciate the efforts of the department, to date, to work with the cities to achieve an expedited review.

But, we also think that the concept of limited, informal and more narrow review of these municipal programs, justifies a municipal approach to confidential treatment. We note that these draft contracts are not public documents yet, under the public records law applicable to any other draft municipal contract. These draft contracts would not be treated as complete documents that are subject to public disclosure under the public records law until we submit complete contracts, including the final prices and final terms to the DTE for approval.

Confidential Treatment Pursuant to G.L. c 164 s 5D

General Laws c 164 s 5D outlines a three part test that the Department uses in the normal course to review requests for confidential treatment when reviewing documents filed by investor owned utilities. We believe this request for confidential treatment, meets this higher utility standard.

1. First the information for which protection is sought must constitute " trade secrets, (or) confidential, competitively sensitive, or other proprietary information.

   The draft contracts in question are covered by explicit promises of confidentiality. Both the RFP document itself and the draft contracts submitted, state that these documents will be treated as confidential to the extent allowed by law. It is essential that these documents should be treated as confidential by the cities until they were submitted in final ready to be approved form. We have communicated this promise of confidentiality to our bidders.

   The draft contracts are competitively sensitive. We are still in the procurement phase, do not have final prices, and have not made final contractor selections. To share the terms and conditions offered by one bidder with all of the competitive suppliers in the state, (which includes other bidders in our procurement) before the negotiation is completed, would seriously compromise our procurement.

2. Second, the requesting party must prove the need for confidential treatment.

   To share the terms and conditions offered by one bidder with other competitors before the negotiation is completed a) is fundamentally unfair, b) would violate the rules of our procurement, c) limit our ability to negotiate with other bidders if

we need to do that before final prices are approved, and d) potentially lead to the withdrawal of competitive offers.

We note that this request for confidential treatment is very similar to the request for confidential treatment made by WMECO in DTE 97 – 120 regarding their procurement of standard offer and default service. We quote from Mr. Klionsky's December 23, 1999 motion:

"The material that WMECO seeks to keep confidential is similar to that afforded confidential treatment in New England Power Co, et al. DPU / DTE 97-94, Boston Edison Company, DTE 97-113, Western Massachusetts Electric Company, DTE 97-29, Boston Edison Company L'Energia Limited Partnership DTE 99-16; and Western Massachusetts Electric Company DTE 99-56. Information on the bids submitted by the parties and the price terms of individual contracts is extremely confidential and must be granted protective status."

If the price and terms in the WMECO procurement were "extremely confidential", after the procurement was over and the final contracts were negotiated, that is doubly true in this case, where the procurement and the negotiations are still pending.

3. Third the Department may protect only so much of the information as is necessary and may limit the length of time that such protection will be in effect.

We note in the WMECO case cited above, the company was seeking confidential treatment of a complete report on a permanent basis, after the contracts for standard offer service had been fully negotiated.

We are only seeking confidential treatment for the two to three week period that the department needs to review these draft retail contracts. All parties involved fully expect that the final retail contracts, with final terms and conditions, and final prices that are submitted for final review and approval will be public records. It does not make sense however, for us to ask our bidders which portions of their draft contracts they are willing to share with their competitors while the negotiations are still pending.

We are prepared to disclose these draft contracts to DOER, the Attorney General, and the two distribution companies that service these two cities, following the execution of a confidentiality agreement by those entities.

We sincerely appreciate the efforts of the department to date, and respectfully request confidential treatment of the draft electric supply contracts for Haverhill and Easthampton.

If the department grants this motion for confidential treatment, we are in a position to quickly file the draft retail contracts and hopefully initiate the final two to three week phase of Department review that we discussed in our January 27 technical session.

Respectfully submitted for

Easthampton and Haverhill

John Shortsleeve, Esq.